special circumstances were shown why I should exercise my discretion but on the contrary, such a stay would defeat the very purpose of the order I had just made, I had also dismissed the opposing shareholders' oral application for stay but granted them leave to appeal to the Supreme Court.

Petition granted.

Solicitors: *Shook Lin & Bok; RR Sethu; Murthi & Partners.*

Reported by *PS Ranjan*

Public Prosecutor v Vengadasalam & Ors

HIGH COURT (ALOR SETAR) — CRIMINAL REVISION NO 53-03-1987
LIM BENG CHOON J
25 SEPTEMBER 1988

Criminal Procedure — Witness — Defence counsel acting as witness for the prosecution — Jurisdiction of court to restrain counsel from appearing — Power of review of the High Court — Criminal Procedure Code (FMS Cap 6), s 323 — Courts of Judicature Act 1964, s 35

Legal Profession — Counsel acting as witness — Power of court to supervise advocate — Defence counsel appearing as witness for prosecution — Legal Profession Act 1976, s 102 — Legal Profession (Practice and Etiquette) Rules 1978, r 28(a)

Constitutional Law — Right to counsel of choice — Power of the court to interfere with right to counsel

By an order dated 12 October 1986, made by a magistrate, the accused persons' counsel, SP Annamalai, was removed from acting for the accused on the ground that he had been summoned to appear as a witness for the prosecution in the case against the accused. The accused applied to the High Court to review the magistrate's order.

Held, setting aside the order:

(1) The powers of revision of the High Court are left to be exercised according to the discretion of the judge. That discretion must be exercised according to the rules of reason and justice and according to law. There must be substantial ground or reason before a judge should invoke the power of revision conferred on him.

(2) It is a well settled principle of law that an accused person has a right to counsel. A court should, however, have the inherent jurisdiction to ensure that all trials are conducted justly and fairly. No person, least of all an advocate, should be allowed to interfere with or obstruct the performance of this duty by the presiding judicial authority.

(3) It is undesirable for an advocate to appear as a counsel in a trial when he is required to be a material witness. If an advocate, knowing that he is going to be a material witness, insists on appearing as counsel in the case, the presiding court has the jurisdiction to take the appropriate action in the interest of justice to ensure the fair and orderly conduct of the trial. In the present case, the magistrate, therefore, had the jurisdiction to make an order restraining Mr Annamalai from acting for the accused persons.

(4) The court should, however, be slow to interfere with the right of a party to be represented by counsel of his choice, and a strong case must be made out before an order restraining the selected counsel from acting in a particular case can be made. In these circumstances, the onus of proof is on the prosecution to provide the court with some material to indicate that the counsel in question is a witness who is required to give material evidence.

(5) In the present case, the prosecution gave no indication as to why Mr Annamalai was regarded as a material witness. The only evidence adduced was the submission of the prosecuting officer that a statement was recorded from Mr Annamalai and that he was required to give material evidence. This was not sufficient. The order of the magistrate was therefore wrong and could not be sustained and was accordingly set aside.

Cases referred to

1 *Re Soo Leat* [1956] MLJ 54 (refd)
2 *Kok Heng Chow* v *Lay Mee Yin* [1948] MLJ 157 (refd)
3 *PP* v *Mah Chuen Lim & Ors* [1975] 1 MLJ 95 (refd)
4 *Lai Kwai Wah & Anor* v *PP* [1987] 1 CLJ 35 (refd)
5 *Phoon Liat Sum* v *PP* [1950] MLJ 205 (refd)
6 *Lodd Govindoss* v *Rukmani Bhai* AIR 1916 Mad 5 (refd)
7 *Re Kandan Padayachi* AIR 1938 Mad 873 (refd)
8 *Emperor* v *Dadu Ramu* AIR 1939 Bom 150 (refd)
9 *Re Chathukutty* AIR 1959 Kerala 119 (refd)
10 *Mahadevappa* v *Madaverappa* [1964] 1 Cri LJ 601 (refd)
11 *R* v *Secretary of State for India in Council & Ors, ex p Ezekiel* [1941] 2 All ER 546 (refd)
12 *Yee Chang & Co Ltd* v *NV Koninklijke Paketvaart Maatschappij* [1958] MLJ 131 (folld)
13 *Myers* v *Elman* [1940] AC 282 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 35
Criminal Procedure Code (FMS Cap 6) s 323
Legal Profession Act 1976 s 102
Legal Profession (Practice and Etiquette) Rules 1978 r 28(a)

SP Annamalai for the applicants.
Malik Haji Ishak (State Legal Adviser) for the respondent.

Cur Adv Vult

Lim Beng Choon J: By letter dated 28 July 1987, a firm of advocates and solicitors drew the attention of this court to an order made by the learned magistrate on 12 October 1986 resulting in the removal of Mr SP Annamalai, an advocate and solicitor of the firm, from defending N Vengadasalam, N Appalasamy and M Subramaniam who were and still are named as the first, second and third accused respectively in the charge sheet of the criminal case registered as Alor Setar Magistrate's Court Arrest Case No A/A:244 of 1985 on the ground that Mr SP Annamalai had been summoned to appear as a witness for the prosecution in the same case. Apparently, Mr SP Annamalai was appointed by the three accused as their defence counsel in the trial of the said arrest case in which

they were jointly charged for an offence under ss 465 and 471 of the Penal Code (FMS Cap 45) read with s 34 of the said Code. It was alleged in the letter of 28 July 1987 that the learned magistrate was wrong in making the order since it had the effect of depriving the three accused of their right to be represented by a counsel of their choice. Hence Annamalai & Co urged this court to exercise its power of revision pursuant to s 323 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') and also under the general supervisory and revisionary jurisdiction conferred on this court under s 35 of the Courts of Judicature Act 1964 (Act 91) to review the order of the learned magistrate. In the result, I called for the record of the case and the trial of the case was also stayed until further order of this court.

The short but nevertheless important question arising from this revision is whether the learned magistrate has got jurisdiction to forbid the advocate in question to appear as counsel for the three accused persons in the trial of the criminal case and if so under what circumstances should the learned magistrate exercise that jurisdiction.

Before I proceed to consider the matter under revision, it is necessary for me at the outset to examine the scope of the revisionary powers of the High Court as conferred by s 323 of the CPC and s 35 of the Courts of Judicature Act 1964. It is convenient at this juncture to set out the provisions of the two sections of the aforementioned statutes. The provisions of s 323(1) of the CPC read as follows:

> Power to call for records of inferior Courts.
>
> (1) A Judge may call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying himself as to *the correctness, legality or propriety* of any finding, sentence *or order recorded or passed*, and as to the regularity of any proceedings of such inferior Court. (Emphasis added.)

The provisions of s 35(1) of the Courts of Judicature Act 1964 are as follows:

> In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable *in the interests of justice*, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court call for the record thereof and may remove the same into the court or may give to the subordinate court such directions as to the further conduct of the same as justice may require. (Emphasis added.)

The italicized words in the two sections set out above clearly show that the powers of revision are left to be exercised according to the discretion of a judge. It is trite law that a discretionary power must be exercised according to the rules of reason and justice and according to law; it must not be exercised arbitrarily or capriciously. There must be substantial ground or reason before a judge should invoke the power of revision conferred on him. But once a judge is satisfied that such ground or reason exists to warrant his exercise of the revisionary power, his discretion is 'untrammelled' and he may freely exercise the power according to the circumstances of the case in order to rectify any gross and palpable failure of justice and to correct any misapplication of the law — see *Re Soo Leat*[1] and *Kok Heng Chow* v *Lay Mee Lin*.[2]

Before I embark on a revision of the impugned order of the learned magistrate, there are two matters which have to be considered at the threshold of this revision. First, at one stage, I was not quite sure whether this court should intervene merely on the strength of the letter written by Annamalai & Co when the three accused had not thought it fit to challenge the order of the learned magistrate and claim their right to be represented or defended by Mr SP Annamalai. It is a well settled principle of law that the right to counsel is conferred on an arrested person himself (which must invariably include an accused facing trial in a criminal court) — see *PP* v *Mah Cheun Lim & Ors*.[3] However, on checking through the relevant record of the magistrate's court, Alor Setar, I found that the three accused had indeed written a letter dated 18 February 1987 to the learned magistrate stating quite unequivocally that Mr SP Annamalai was (and I take it he still is) the counsel of their choice and they wanted him to continue to act for them and to defend them in the criminal case. In the circumstances, I have no doubt that Annamalai & Co who were (and I take it they still are) the solicitors representing the three accused and they therefore have the standing to act on behalf of the three accused and to request this court to review the order of the learned magistrate.

The second and more important point which I must consider at the threshold of this revision is whether there is any substantial reason for this court to intervene by way of revision pursuant to s 323 of the CPC and s 35 of the Courts of Judicature Act 1964. In considering this point, it is useful to note that the sum and substance of the complaint of the three accused persons (for convenience, I shall hereinafter collectively refer to them as 'the applicants' and individually as the first, second and third applicants respectively unless otherwise specified) is that they have been deprived of their constitutional right to be defended by counsel of their choice when the learned magistrate made the order of 12 October 1986 prohibiting their counsel from defending them in the criminal case. It cannot be gainsaid that an allegation grounded on an infringement of a fundamental constitutional right is prima facie a serious matter. Unless this court is satisfied that from the record of the case there is very little substance in the allegation and that the complaint is frivolous or vexa-

tious, this court should have no hesitation in invoking its revisionary powers to review the correctness, legality or propriety of the impugned order — see *Lai Kwai Wah & Anor* v *PP*.[4] From my scrutiny of the record in this revision, I am satisfied that the complaint of the applicant involves a serious point of law which warrants this court to exercise its discretion to review the order of the learned magistrate.

Adverting to the central issue in this revision, I find that there is a dearth of local authorities on the subject of whether an accused can still insist on his right to counsel of his choice when the counsel is required to give evidence for the prosecution at the same trial. There is no doubt that a fair number of cases have been brought before our courts to determine the issue of the right to counsel but the question that was posed in almost all these cases relates to how soon after a person was arrested would he be entitled to see and instruct his counsel or whether an accused had a right to ask for a postponement of the hearing of the criminal case when the counsel of his choice failed to turn up at the hearing. These authorities are therefore not quite relevant and I do not propose to expend much exercise in analysing the rationale of the decisions in the said authorities except to say that these authorities have clearly advocated that the right to counsel is not an absolute right and a person can only claim the right to be represented by a counsel of his choice if and only if the selected counsel is willing and able to represent him. There is, however, one local authority which has dealt with a question arising from the issue of an accused's right to counsel which is similar to the one now before this court. In *Phoon Liat Sum* v *PP*,[5] the prosecuting officer who conducted the prosecution of the accused for an offence of possesion of opium at the lower court was also called to testify for the prosecution. The accused was duly convicted and when the case went on appeal to the High Court, counsel for the appellant laid great stress on the impropriety of the prosecuting officer taking upon himself the dual role of prosecutor and witness in the same trial. In considering the complaint of counsel, Hill J made the following observation:

> The undesirability of this practice is obvious and it has previously been the subject of unfavourable comment by this court. Unfortunately, for practical reasons, it is generally unavoidable. In certain aggravated circumstances it might well result in a conviction being quashed on appeal, but in the present case under review I do not think that the dual role played by Mr Locke caused any material injustice.

The observation of Hill J may appear to be rather terse and concise. However that may be, the learned judge has nevertheless succinctly expressed a judicial view which is shared by many judges of other jurisdictions. We shall first of all turn to India, a fertile ground from where one can usually find judicial guidance to resolve problems of this nature. The first case I would like to refer to is *Lodd Govindoss* v *Rukmani Bhai*.[6] In that case, objection was taken to one Mr V Row giving evidence for the defence as he was the leading counsel who appeared for the defendants. In rejecting the objection, the learned trial judge made the following remarks:

> Though it is no doubt desirable that counsel ought not to appear in a case where it is probable that his evidence would be material, I do not think that there is any inflexible rule that his evidence ought not to be taken, if, at any stage of the suit, it becomes necessary to do so. To lay down such a hard and fast rule would often defeat the ends of justice.

However, it is important to take note that in that case counsel withdrew from the case as soon as the plaintiff's evidence was over and the defence was conducted by the assisting counsel before Mr V Row gave evidence for the defence.

In the second case of *Re Kandan Padayachi*,[7] a magistrate had made an order disallowing an advocate from appearing as counsel for the accused in a case of murder pending inquiry before him. The disallowance was made entirely on the ground that the advocate had been cited as a witness by the police in the charge sheet. Complaint was made to the Madras High Court judge who, in exercise of his power of revision, set aside the order and in so doing made the following observation:

> The reason given for the disallowance is obviously unsound. The mere fact that a lawyer is cited as a witness by the prosecution will not disqualify him from appearing as counsel for the accused in the case. No doubt it is not in accordance with professional etiquette for a lawyer who has given evidence as a witness for the prosecution to accept or *to continue* to hold a brief from the accused. This is not the case here. The mere citing of an advocate as a witness by the police does not operate as a disqualification. (Emphasis is mine.)

It is useful to pause here for a moment to take note of the warning contained in the observation made in these two cases of the Madras High Court and it is this: as a general rule it is obviously undesirable for an advocate to act as counsel for the defence or for that matter the prosecution and also to be a witness for the opposite party in the same trial. A very lucid discourse on this matter emerges from the third Indian case of *Emperor* v *Dadu Ramu*.[8] In that case again the magistrate who presided at the trial of an accused made an order forbidding his defence counsel from acting for him as the prosecution proposed to call the said counsel as a witness. In setting aside the magistrate's order, Beaumont CJ said:

> The question whether the court has jurisdiction to forbid an advocate to appear in a particular case involves the consideration of conflicting principles. On the one hand, an accused person is entitled to select the advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice merely by serving a subpoena on the advocate to appear as a witness. On the other hand, the court is bound to see that the due administration of justice is not in any way embarrassed. Generally, if an advocate is called as a

witness by the other side, it can safely be left to the good sense of the advocate to determine whether he can continue to appear as an advocate, or whether by so doing he will embarrass the court of the client. If a court comes to the conclusion that a trial will be embarrassed by the appearance of an advocate, who has been called as a witness by the other side, and if, notwithstanding the court's expression of its opinion, the advocate refuses to withdraw, in my opinion in such a case the court has inherent jurisdiction to require the advocate to withdraw. An advocate cannot cross-examine himself, nor can he usefully address the court as to the credibility of his own testimony, and a court may well feel that justice will not be done if the advocate continues to appear. But, in my opinion, the prosecution in such a case must establish to the satisfaction of the court that the trial will be materially embarrassed, if the advocate continues to appear for the defence.

It is worthy of notice that in that case the magistrate had been told by the police prosecutor that from the point of view of the prosecution, the said counsel was a material witness. On the other hand, counsel himself had put in a statement from which it appeared that he knew nothing whatsoever about the facts on which the prosecution relied. The principle laid down in *Dadu Ramu*'s case[8] was cited with approval 20 years later in the case of *Re Chathukutty*.[9] In that case, the accused was charged with an offence under s 224 of the Indian Penal Code, which deals, inter alia, with escape from lawful custody. His counsel produced him before the appropriate authority and subsequently moved an application for bail on behalf of the accused and also got him enlarged on bail. For this reason, defence counsel's name was included in the list of prosecution witnesses just to prove the fact that he had produced the accused before the appropriate authority. On account of this circumstance, the prosecutor objected to the counsel appearing to defend the accused. The magistrate who heard the case allowed the objection. The matter went on revision before the High Court of Kerala. The revising judge, in quashing the order of the magistrate, agreed with the proposition enunciated in *Dadu Ramu*'s case[8] and went on to say (at p 120):

> The true rule in such matters is, in my opinion, as follows: Counsel though they may be engaged in the case are in law competent to testify whether the facts in respect of which they gave their evidence occurred before of after their retainer (see s 118 of the Evidence Act and *Cobbett* v *Hudson* (1895) 1 E1 and B1 11). The court has no authority to exclude such evidence if tendered. It is not in all cases a breach of professional ethics for counsel retained in the case to give his evidence in it. There are cases in which he properly may, and, indeed, should do so. At the same time it is recognized by both the court and the profession that, as a general practice, it is undesirable, when the matter to which counsel deposes is other than formal, that they should testify either for or against the party whose case they are conducting. In judging the matter from the point of view of what is desirable as opposed to what is legal, much must depend on the circumstances of each case.

One final case which I would like to refer to is *Mahadevappa* v *Madaverappa*.[10] In that case, although it is acknowledged that the courts should not interfere with a person's right to counsel of his choice, nevertheless it provides a contrast in outcome. There the respondent had filed a complaint against the petitioner in Criminal Case No 1564 of 1962 of the Nanjangud magistrate court for an offence of criminal defamation. It appeared that the petitioner had earlier filed a written statement in OS No 171 of 1962 at a munsiff court which contained the alleged defamatory materials and one Sri Benkatarao was counsel for the petitioner, and it was he who filed the said statement on behalf of the petitioner. The respondent thereupon caused a notice to be served on the petitioner alleging that the petitioner had defamed him and that he proposed to proceed against him. To that notice, the petitioner caused a reply to be sent through another counsel, Sri Narayana Rao. The petitioner again alleged that the contents of the reply were equally defamatory. The two counsel continued to represent the petitioner in the criminal case and this was objected to by the respondent on the ground he had cited both Sri Venkatarao and Sri Narayana Rao as his witness. The learned magistrate, after considering the question of the propriety of the two advocates, issued an order prohibiting the two advocates from defending the petitioner in the criminal case. The matter was taken up in revision by the Mysore High Court. In upholding the order of the learned magistrate, Hedge J said:

> Sri M Krishnaswamy, learned counsel for the petitioner, strenuously contended before me that the right of a party to engage the lawyer of his choice is a very valuable right and the courts should not interfere with that right lightly. To support this contention of his, he invited my attention to a decision of the old Mysore High Court in *Nimba* v *State of Mysore* (S) AIR 1955 Mys 112. As a broad proposition of law, the contention advanced is unexceptionable. No authority is needed in support of that contention. But the real question for decision in this case is whether the court should permit a person to act as a witness for one party and as counsel for the other. It would be highly incongruous for an advocate to appear in the witness-box at one stage and as an advocate at another stage. I am sure that no respectable advocate would ever like to fit into that position, and if any advocate chooses to ignore this rule of professional etiquette, the courts will have to protect the profession by refusing them permission to act in that manner.

It is clear in that case that the two advocates were involved in the formulating of the alleged defamatory statement and reply respectively. Hence they would be material witnesses in the criminal case.

It is appropriate to pause here for a moment to summarize the principles enunciated in the afore-mentioned Indian authorities. There is no doubt, at least in India, that the courts should have inherent authority to refuse to permit a particular advocate to appear on behalf of a particular person in a particular case when it would be gross misconduct on the part of the advocate so to appear. But the courts are always slow to interfere with the right

which a party has to be represented by counsel of his choice and a strong case must be made out before an order restraining the selected counsel from acting in a particular case will be made. The mere fact that the prosecution asserts that the defence counsel will be required as a witness for the prosecution and that the magistrate himself thinks that he will be a material witness is not sufficient. The prosecution must at least provide the court with some material to indicate that the counsel in question is a witness who is required to give material evidence. On the other hand, it is desirable that an advocate should not appear in a case if he knows or has reason to believe that he will be an important witness in the case and no self-respecting advocate should conduct a case under such circumstance, for if he does, he may find that after having given evidence for the opposite side he may have to retire and leave his client in a lurch. Worse still, he may find that he has laid himself open to a charge of misconduct.

In England the courts too have stressed the undesirability of counsel appearing to defend a litigant and also as a witness in the same trial — see 3 *Halsbury's Laws of England* (4th Ed) para 1187 and *R* v *Secretary of State for India in Council & Ors, ex p Ezekiel*[11] where Humphreys J said (see p 556):

> There is a short observation which the other members of the court desire me to make and with which I agree. It has been brought to the attention of the court that, on the hearing at Bow Street, junior counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as counsel in the case. No objection was taken to this by counsel on the other side. We think it right to point out that this was irregular and contrary to practice. A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as both counsel and witness in the same case.

The next matter to consider is whether the principles enunciated by the Indian courts are applicable in our system of administration of justice. There is no doubt that in our country the discipline and control of advocates (a single word which, for brevity, will be convenient to use to describe a member of the fused profession) generally is vested with the Malayasian Bar — see Part VII of the Legal Profession Act 1976 but an appeal against the decision of the disciplinary committee, which is appointed by the Chief Justice, lies to the High Court at the instance of any person who is dissatisfied with such decision — see s 102 of the said Act. Thus the High Court is the ultimate arbitrator regarding any disciplinary action which should or should not be taken against a recalcitrant advocate. In any event, the proper conduct of a fair trial of a criminal or civil proceeding in court lies entirely with the presiding judicial authority, be he a magistrate, a sessions or High Court judge. It follows therefore that it is essential that a court should have inherent jurisdiction to ensure that all trials are conducted with the paramount aim at the proper dispensation of justice and fairness. No person, least of all an advocate, should be allowed to interfere with or obstruct the performance of this paramount duty by the presiding judicial authority. This proposition is encapsulated in the following terse but apt statement made by Whyatt CJ in his judgment in *Yee Chang & Co Ltd* v *NV Koninklijke Paketvaart Maatschappij*[12] at p 133:

> It has been said by Lord Wright in *Myers* v *Elman* [1940] AC 282 at 319, that the court has a right and a duty to supervise the conduct of its solicitors and the court would be failing in the discharge of that duty if it passed over the conduct of the defendants' solicitors in this litigation in silence. It has been laid down by the House of Lords in *Myers* v *Elman* that a solicitor owes a duty to the court to conduct litigation with due propriety and to assist in promoting in his own sphere the cause of justice.

There is therefore no doubt that in the present case, the learned magistrate has jurisdiction to make the order.

That however is not the end of the matter. The more important question that has to be considered is this: 'was the learned magistrate right in making the order?' To answer this question it is useful to note that r 28 of the Legal Profession (Practice and Etiquette) Rules 1978 provides:

> Advocate and solicitor not to appear in a case where he is a witness.
>
> (a) An advocate and solicitor shall not appear in Court or in Chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his client's interest.
>
> (b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.
>
> (c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as a formal or undisputed fact in a matter in which he acts or appears.

It cannot be gainsaid that, from the provisions of this rule, an advocate is not barred from appearing in court to defend an accused simply because he is also required to be a witness for the prosecution in the same trial. It is only when he is required to be a witness of a material and disputed question of fact that it is undesirable for him to appear as a counsel in the same trial. Although the section appears to leave it to the good sense of the advocate to decide whether he is a material witness or not, nevertheless, I cannot accept a contention that should an advocate stubbornly insist on appearing in court notwithstanding that it is crystal clear that he is going to be a witness of a material fact, yet a magistrate or a sessions or High Court judge who is presiding over the proceeding, as the case may be, can do nothing to restrain him from appearing. In such a situation, I am of the view that the presiding judicial authority must have an inherent jurisdiction to take the appropriate action in the interest of justice and in

ensuring a fair and orderly conduct of a criminal or civil proceeding. I must say at once, lest I be misunderstood, that I do not think that any member of the Malaysian Bar would care to conduct himself or herself in such an irresponsible manner. From the above interpretation of r 28, it is my considered opinion that the principles enunciated in the Indian authorities cited above can be safely applied to the present case. In applying the said principle to this case, I do not think that the learned magistrate was right in making the order. The only evidence, if it could be called evidence in the strict sense of the word, to show that Mr SP Annamalai has to be a material witness, came from the arguments of the prosecuting officer in his submission at the hearing of the preliminary objection, where he said that a statement had been recorded from Mr SP Annamalai under s 112 of the Criminal Procedure Code and that he was required to give material evidence at the trial of the criminal case. These statements were not made under oath. On the other hand, Mr SP Annamalai retorted by saying that he was only required to give formal evidence. Bearing in mind that the onus of proof is on the prosecution, there is no doubt that the prosecution had not discharged the onus. The prosecution should at least give some indication as to why Mr SP Annamalai was to be regarded as a material witness. The fact that he had given a statement under s 112 of the Criminal Procedure Code and that a summons had been taken out to require him to testify on behalf of the prosecution are certainly not sufficient to classify him as a material witness. For these reasons, I am satisfied that the order made by the learned magistrate is wrong and cannot be sustained. The said order is hereby set aside. The criminal trial in question should proceed and Mr SP Annamalai is allowed to appear to defend the three accused persons if they so desire.

It may be appropriate to conclude this judgment with a brief advice and I do so without any intention of reprimanding anybody or to cast aspersion on anyone, but simply because, since I have not been advised as to whether the prosecuting officer's claim that learned counsel was required to give evidence on a material fact has any substance or not, I feel that I should take this step. Although I have lifted the injunctive order restraining Mr SP Annamalai from defending the three accused persons, nevertheless, perhaps learned counsel would like to reconsider whether it would be wise for him to continue to defend his clients. Should it turn out that, in the midst of testifying, his evidence is quite material, he would have to retire and his clients would be left in the lurch, and what is worse is that he may find himself open to a charge of misconduct. Having said this, I shall leave it to the good sense of learned counsel to consider the matter.

Order accordingly.

Solicitors: *Annamalai & Co.*

Reported by *Mathavan Devadas*